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In the Supreme Court of the United States

No. 901.
OCTOBER TERM, 1969.

UNITED BONDING INSURANCE COMPANY,
Petitioner,

vs.

ASHWOOD CONSTRUCTION COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION.

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STATEMENT OF THE CASE.

This case comes before the Court upon the petition of United Bonding Insurance Company (United) for a writ of certiorari from the judgment of the United States Court of Appeals for the Sixth Circuit entered August 11, 1969, affirming the judgment of the United States District Court for the Northern District of Ohio, Eastern Division. The case involves questions of liability of the surety, United, to its obligee, Ashwood Construction Company (Ashwood) and to sub-contractors who furnished labor, material and necessary tools to the principal, Timzan, Inc. (Timzan) for certain construction in connection with a housing development in the Brentwood Subdivision in Cuyahoga County, Ohio.

On December 11, 1964, Ashwood entered into three unit price contracts with Timzan for the improvement of

91 sublots in Brentwood Subdivision. One of the contracts was for site clearing and grading, another was for the installation of water lines and sanitary and storm sewer mains, and the third was for the construction of sidewalks, roads and curbs. (Ashwood Exhibits II, JJ and KK) Each contract contained a date for completion and liquidated damages at a daily rate in the event that work was not completed on or before the stipulated date.

In addition, each of the three contracts provided that:

> "The contractor shall furnish an acceptable surety bond in an amount at least equal to 100 per cent of the contract price as security. For the faithful performance of this contract and for payment of all persons performing labor and furnishing materials in connection with this contract." (Ashwood Exhibit LL)

Payment of the contracts was guaranteed in writing by Ashwood's parent company, Dover Construction Company (Dover), and was not due until all work was completed. (Ashwood Exhibit CC)

On or about December 16, 1964, United issued and delivered to Ashwood three separate bonds to guarantee the performance of Timzan under each of its aforesaid contracts with Ashwood. (Joint Defendants' Exhibits 2, 12 and 13) Each of the bonds was conditioned not only for the faithful performance of the construction contracts by Timzan, but also for the payment of "all persons who have contracts directly with the principal [Timzan] for labor and materials."

The bond to guarantee Timzan's performance under its contract for installation of water lines, sanitary and storm sewer mains was in the sum of $161,000.00, and upon delivery thereof, Ashwood complained that its face amount was insufficient to cover the total amount of an-

ticipated cost for the installation of water lines and sanitary and storm sewer mains, and requested a bond in the sum of $233,000.00, which was Ashwood's estimate of the cost of such installation. After conferences between Ashwood and Timzan, it was agreed that a bond in the sum of $221,000.00 would be sufficient to cover the total cost of installation of water lines and sanitary and storm sewer mains, whereupon on or about January 25, 1965, United issued a rider whereby the penal sum of said bond was increased from $161,000.00 to $221,000.00. (R. 1657-72) On March 18, 1965, in response to the request of Ashwood, United delivered a certified copy of the rider to the aforesaid bond, which rider was signed in the original and to which the seal of United was affixed. (Ashwood Exhibit E) (Joint Defendants' Exhibit 7)

On or about March 26, 1965, Timzan defaulted in its obligations under each of its contracts with Ashwood. (R. 1672-73, 1912) (Joint Defendants' Exhibit 16)

On April 1, 1965, United, Ashwood and Timzan entered into an agreement in writing under the terms of which Timzan agreed to withdraw from its contract, and United agreed to assume all of the obligations of Timzan under the latter's contract with Ashwood. (Joint Defendants' Exhibit 22) In partial consideration for such agreement on the part of United, said agreement provided for an extension of the date for completion of the contract for installation of water lines and sanitary and sewer lines.

In accordance with the terms of the aforesaid "Takeover Agreement," United did enter into various agreements with contractors and materialmen to complete the installation of improvements in Brentwood Subdivision. (R. 1017-49) Thereafter, on May 7, 1965, United informed Ashwood that it considered "their Bonds No. CB (sic.)

1097-1098 and 1099 null and void from their inception," and repudiated its liability not only on the bonds but also under the Takeover Agreement. (Joint Defendants' Exhibit 8)

On June 14, 1965, United filed its complaint for declaratory judgment in the District Court seeking a determination of its rights and liabilities. Ashwood filed a counterclaim seeking compensatory and punitive damages against United, and the various sub-contractors and materialmen employed by Timzan and United filed counterclaims against United seeking payment of the respective amounts due them for labor, materials and tools furnished for the improvement of Brentwood Subdivision.

The trial commenced on June 19, 1967 before the Honorable Gerard E. Kalbfleisch and concluded on July 14, 1967.

At the time the trial commenced, only one paragraph of the original complaint formed the basis for the declaratory judgment of non-liability sought by United, namely Paragraph 18, which stated that:

> "(18) At a date unknown to the plaintiff the defendant Ashwood Construction Company, increased that portion of the contract of construction known as Phase 1 from One Hundred Sixty-One Thousand Dollars ($161,000.00) to Two Hundred Twenty-One Thousand Dollars ($221,000.00) without the authorization or consent of this plaintiff."

The complaint remained unchanged until after the commencement of the trial, when, on June 29, 1967, United, over objection of Ashwood, was permitted to amend its complaint in order to interject as an issue for the first time the solvency of Ashwood. On June 30, 1967, United filed an amended complaint in which it

added certain language to Paragraph 18 and added a new Paragraph 20, which paragraphs then provided as follows:

> "(18) At a date unknown to the plaintiff the defendant Ashwood Construction Company, increased that portion of the contract or bond requirement of construction known as part of Phase 1 from One Hundred Sixty-One Thousand Dollars ($161,000.00) to Two Hundred Twenty-One Thousand Dollars ($221,000.00) without the authorization or consent of this plaintiff."
>
> "(20) That at the time performance of the various contracts became due, Ashwood Construction Company was insolvent and unable to meet its obligations as they matured."

Thus, the complaint, as amended, raised but two factual issues, the first being whether Ashwood at any time changed either the amount or the bonding requirements of its contract with Timzan for the installation of water lines and sewer mains, and the second being whether Ashwood was insolvent and unable to meet its obligations as they matured at the time performance of its various contracts with Timzan became due.

The Court expressly found that neither the amount of Ashwood's contract with Timzan or its bond requirement had been increased and that Ashwood was not insolvent at any time relevant to the issues of this case.

On January 10, 1969, judgment was entered against United and in favor of Ashwood and the various subcontractors and materialmen who furnished labor, materials and necessary tools for the improvement of Brentwood Subdivision.

In addition, the Court ordered that by reason of United's willful and intentional breach of its obligation

and its failure to confer any substantial benefit on Ashwood by reason of the partial performance of its contracts, United was barred from subrogation and from any recovery whatsoever against Ashwood.

The Court refused to award Ashwood compensatory damages for lost profits and certain other expenses allegedly incurred by it as the result of United's default, and refused to award Ashwood punitive damages.

United appealed the judgment of the District Court to the United States Court of Appeals for the Sixth Circuit. Ashwood cross-appealed for compensatory damages for lost profits and punitive damages. The Court of Appeals affirmed the judgment of the District Court, finding that the extensive findings of fact of the District Court were supported by substantial evidence and that its conclusions of law were correct. (Petition for Writ of Certiorari, *Conclusions of Law*, p. 54)

THE WRIT SHOULD BE DENIED.

Although United bases its request for a writ of certiorari in this case upon the alleged failure of the Courts below to apply the law of Ohio in accordance with the doctrine of *Erie R.R. Co. v. Thompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188, it is clear from an examination of the reasons assigned by United for the granting of a writ of certiorari that United's basic disagreement is with the findings of fact by the District Court, and not the application of the law to those facts.

I. The District Court Properly Refused to Grant United's Motion to Dismiss Ashwood as the Real Party in Interest.

To support its claim that Ashwood is not the real party in interest in this case, United at page 6 of its brief, quotes out of context a portion of one sentence from a letter agreement dated May 7, 1965, in order to create the illusion that on the aforesaid date Ashwood made a "general assignment" of all of its assets to Commercial Discount Corporation.

The portion which United quotes in its brief is as follows:

> " 'We hereby grant you a security interest in *and assign and pledge to you* all present and future accounts, chattel papers, *contract rights.* * * *' (Emphasis supplied.)"

The full sentence from which the above quotation was excerpted is as follows:

> "We hereby grant you a security interest in and assign and pledge to you all present and future accounts, chattel paper, contract rights *and instruments which are collateral security for the loans and advances made under the agreement between us dated November 2,*

1964, as additional security for all notes, loans and advances hereunder." (Joint Exhibit 1-V)

The language which is italicized above is that which has been omitted by United from the quotation which appears in its brief.

The "present and future accounts, chattel paper, contract rights and instruments which are collateral security for the loans and advances made under the agreement between us dated November 2, 1964," are fully and explicitly set forth in the agreement between United and Commercial Discount Corporation, dated November 2, 1964, which agreement provides that:

> "We are engaged in the business of purchasing and selling land and selling and contracting for the construction of homes on such land and in the course of our business we acquire from the purchasers of such land and buildings purchase money, notes and second mortgages made by such purchasers. We desire to offer you our note to evidence loans to be made to us from time to time. To secure such note we will assign and transfer to you on your form of collateral schedule, in the form of Exhibit 'B' attached hereto and made a part hereof acceptable notes, second mortgages and other types of secured deferred payment paper (all hereinafter referred to as 'Accounts') which shall have been acquired by us in the normal course of our business in the states of Illinois, Ohio and Pennsylvania and such other states as may from time to time be approved by you." (Emphasis added) (Joint Exhibit 1-A)

It is apparent that Ashwood did not "pledge and assign all of its assets," but rather "acceptable notes, second mortgages and other types of secured deferred payment paper" acquired by Ashwood in the normal course of its business, namely the sale to purchasers of homes on which Ashwood acquired notes and second mortgages

from such purchasers in consideration for the sale of such homes.

United filed its motion to dismiss Ashwood after the case had been fully tried and submitted to the Court. It was not timely filed and was without merit.

In addition, the relief sought by United, namely the dismissal of Ashwood, was not available under Rule 17 of the Federal Rules of Civil Procedure, which provides that:

> "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

II. As of May 15, 1965, Ashwood Was Solvent and Was Able To Meet Its Financial Obligations As They Appeared.

As previously noted, when United repudiated its liability under its bonds, it asserted only that the bonds were "null and void from their inception." That was on May 7, 1965. On June 14, 1965, when United filed its original complaint seeking a declaratory judgment in the District Court, it alleged as the sole excuse for its alleged non-liability that the contract of construction for which the bond was issued had been raised by Ashwood from $161,000.00 to $221,000.00. There was no mention in the original complaint of the alleged adverse financial condition of Ashwood. On August 16, 1966, an involuntary petition in bankruptcy was filed against Ashwood. It was not until June 30, 1967, eleven days after the commencement of the trial, that United filed an amended complaint raising, for the first time, Ashwood's alleged insolvency.

There was no evidence whatsoever introduced to support the allegation of Ashwood's insolvency, and the District Court properly concluded that:

> "As of the date fixed for completion of the Timzan contracts, that is, on or about May 15, 1965, Ashwood was solvent. Ashwood was not insolvent at any time relevant to the issues of the instant case." (Respondents' Brief, *Findings of Fact No. 70*, p. 38, *infra*)

III. Ashwood Did Not Increase the Bond Requirement From $161,000.00 to $221,000.00. There Was Never at Any Time Any Alteration of the Construction Contract Bonded by United.

Each of the construction contracts entered into by and between Ashwood and Timzan contained the following provisions:

> "The contractor shall furnish an acceptable surety bond in an amount at least equal to 100 per cent of the contract price as security. For the faithful performance of this contract and for payment of all persons performing labor and furnishing materials in connection with this contract." (Ashwood Exhibit LL)

The above provision was never modified in any respect whatsoever, and there was no evidence that was at any time offered by United that could lead to a contrary conclusion.

Ashwood estimated that the cost of performing the installation of water lines and storm and sanitary sewer mains would be the sum of $233,000.00. When Timzan offered a bond in the sum of $161,000.00, Ashwood rejected the same and the representatives of the two companies conferred and agreed that the work to be performed by Ashwood would amount to $221,000.00, and Ashwood

agreed to accept a bond in said sum. Thereupon, in the latter part of December, 1964, or early January, 1965, a request was made by Ashwood of United to increase the amount of the bond furnished for the water line and sanitary and storm sewer main contract. United agreed to furnish such bond, and, in fact executed and issued a rider to the bond guaranteeing performance of said contract, increasing the penal sum of said bond to $221,000.00.

On March 18, 1965, as the aforesaid rider had not been received by Ashwood, the Manager of United's Civil Bond Department mailed Ashwood a certified copy of the same signed by him and sealed by the corporation, increasing the penal sum of said bond by $60,000.00 to the sum of $221,000.00. The rider provided in part that:

> "WHEREAS a recomputation of the work to be done under said contract, at the unit prices stated therein, indicates an estimated contract price of $221,000.00; and
>
> "WHEREAS it was intended that the amount of the aforesaid bond should be one hundred per cent of said estimated contract price, and the parties to said bond desire to have the bond corrected in this respect;
>
> "NOW, THEREFORE, in consideration of an additional premium to be paid the surety, it is agreed that the penal sum of said bond shall hereby be increased by the sum of Sixty Thousand Dollars ($60,000.00), to a corrected sum of Two Hundred Twenty-One Thousand Dollars ($221,000.00);
>
> "BUT THAT SAID BOND SHALL IN ALL OTHER RESPECTS BE AND REMAIN AS ORIGINALLY WRITTEN." (Joint Defendants' Exhibit 7)

To further support its position, Ashwood introduced the testimony of the Manager of the Civil Bond Department of United, who, testifying on cross-examination, testified that:

"The contract in my estimation was never increased." (R. 714)

Upon the conclusion of the case, the District Court held:

> "Rarely has the Court seen a more perfect example of the doctrine of estoppel than applies to the situation of United's attempting to claim that the rider to Bond No. CG-1097 was unauthorized. The evidence clearly supports not only the fact that United did execute a rider to United Bond No. CG-1097 but also that United notified Ashwood of the execution of such rider with the express intention of inducing Ashwood to rely thereon. United errs in its contention that it was incumbent upon Ashwood to prove that the rider was executed; that the rider was signed by Timzan; and that the premium for the rider was paid by Timzan. United is estopped to deny that such did occur when by its own representations it led Ashwood to believe that such events had occurred. United's argument that it escapes liability on its bonds due to the alleged unauthorized increase of a bond amount is without merit." (Petition for Writ of Certiorari, *Conclusions of Law*, p. 31)

IV. The Bond in Question Is a Direct Action Bond, and the Materialmen, Central, Arrow Builders & Supply, Air Compressor Rental Company, J. J. Turner and Arturo Construction May Recover Upon It by Direct Suit.

The argument and cases cited by United in item IV of its petition for writ of certiorari, are the same urged by United in the District Court and in the United States Court of Appeals for the Sixth Circuit. The District Court's Findings of Fact (Respondents' Brief, p. 28, *infra*) and Conclusions of Law (Petition for Writ of Certiorari, pp. 27-28) clearly indicate that United did in fact,

agree, in issuing its bonds, to "pay all persons who have contracts directly with the Principal [Timzan] for labor and materials." (Joint Defendants' Exhibit 2)

United is a compensated surety. For a premium, United agreed to indemnify Ashwood for the performance of Timzan and assured Timzan's faithful performance for payment of all persons performing labor or furnishing materials in connection with the Brentwood project. United again asserts, as it has heretofore, that the distinguishing factor in permitting a laborer or materialman to recover upon direct suit against the paid surety, lies in the nature of the construction (public or private) for which the bond was issued. None of the cases cited by United support such a proposition. *Cleveland Metal Roofing & Ceiling Co. v. Gaspard,* 89 Ohio St. 185 (1914) relied upon by United was expressly overruled by *Royal Indemnity Co. v. Northern Ohio Granite Co.,* 100 Ohio St. 373 (1919) (syllabus 2).

It was determined as a matter of fact, that United intended to and did become obligated to pay the laborers and materialmen herein upon Timzan's failure to do so. The contracts, the faithful performance of which was assured by the bonding company, were incorporated in the bonds by reference. They contained the requirement that the contractor furnish "all of the labor, materials, necessary tools, expendable equipment * * * required to complete" the work. (Ashwood Exhibits II, JJ and KK) Ohio law is well settled that a surety who assures the faithful performance of a Principal is liable to materialmen and sub-contractors who furnished material and labor in default of the principal's payment therefor. It follows that laborers and materialmen do have a direct right of action against the bond. (*Royal Indemnity Co. v. Northern Ohio Granite and Stone Co., supra;* 11 Ohio Jur. 2d, *Con-*

tractors' Bonds, Section 4, p. 186) This was evidenced from the bond, the contract for which the bond was given, and the conduct of the parties in this proceeding. The cases cited by United do not support the proposition that despite United's agreement and intention, as manifested in the bond, it is the nature of the construction (public or private) that determines the rights of laborers or materialmen. There are no decisions of the Ohio Supreme Court which hold that a compensated surety is relieved from liability for the payment to sub-contractors and materialmen, contrary to its agreement, where the bond was issued for private construction.

11 Ohio Jur. 2d, *Contractors' Bonds,* Section 4, p. 186 provides that:

> "It is frequently stated by the courts that the *intention of the parties to a contractor's bond is the controlling factor in determining the right of laborers and materialmen to recover on the bond,* and the right of laborers and materialmen to recover on a building contract's bond depends upon the terms of the bond construed in the light of the contract in connection with which it is executed. Especially in the case of paid sureties, the courts have construed the contract of the paid surety, liberally in favor of liability, and have held that materialmen and subcontractors may sue on such a bond." (Emphasis added)

Each contract between Ashwood and Timzan provided that Timzan "shall furnish an acceptable surety bond for the faithful performance of 'such contract' and for payment of all persons performing labor and furnishing materials in connection" with such contract. The bonds of United incorporated the contracts and further provided that United "pay all persons who have contracts directly with the Principal [Timzan] for labor and materials."

These facts are embodied in the findings of fact of the District Court, which findings were reviewed by the United States Court of Appeals for the Sixth Circuit and found to be supported by substantial evidence.

In addition to liability of United under its bonds, United is liable to the materialmen and sub-contractors under the terms of an agreement dated April 1, 1965, between United, Ashwood, and Timzan and which agreement has been referred to herein, as the "Takeover Agreement." The findings of fact and conclusions of law of the District Court, as affirmed by the United States Court of Appeals for the Sixth Circuit, reflects that the evidence clearly established that pursuant to the Takeover Agreement, United did assume all of Timzan's obligations and did request that the Defendant materialmen and sub-contractors continued to deliver materials and/or to perform services on the Brentwood project. (Brief of Respondent, *Findings of Fact No. 44*, pp. 32-33, *infra*) (Petition for Writ of Certiorari, pp. 26 and 47-48) Accordingly, United, having failed to assert its non-liability under the Takeover Agreement, the issue of liability of United presented in item IV of its petition is moot.

V. United Employed Central to Install the Storm and Sanitary Sewers and Water Mains. Central Was Not a Volunteer. Central Performed the Necessary Conditions Entitling It to Payment.

A. Central Did Not Assume Timzan's Contract With Ashwood.

United sets forth a quotation from Central's cross-petition in an attempt to prove the assumption by Central of Timzan's contract with Ashwood. This is by no means the fact.

Here, again, as throughout these entire proceedings United has seen fit to take quotations out of context or to give them meanings clearly not intended.

United refers to a letter addressed by Central to United (Joint Defendants' Exhibit 40), but fails and neglects to take into consideration or to invite the Court's attention to the following language which appears on page 2 of the same exhibit:

> "To assist you herein and *without in any way assuming the existing contract between Timzan Inc. and Ashwood Construction Company* we will proceed to install the necessary sidewalks, paving, storm sewers, sanitary sewers and water lines * * *.
>
> * * * * *
>
> "* * * *and we in no way assume or agree to be bound by said original contract or any penalties therein contained.*" (Emphasis added)

The District Court's findings of fact and conclusions of law are contrary to United's contention herein. The Court's attention is specifically directed to Findings of Fact Nos. 28, 41, 45, 46, 48, 50 and 51 contained in the Appendix hereto at pages 29, 32, 33, 34, *infra*. The Record is replete with testimony supporting the foregoing findings by the District Court establishing that Central *did not* assume the Timzan contract but rather agreed to install the storm, sanitary sewers and water mains identified in Phase 1 of the original contract between Timzan and Ashwood (R. 1172-1179). United asserts that inspection by a Cuyahoga County sanitary engineer and the City of Cleveland were prerequisites to payment for work performed by Central. The Court considered this contention to be irrelevant and without merit. No evidence was introduced at trial showing such inspection to be a condition precedent

to the payment of sub-contractors. (Petition for Writ of Certiorari, *Conclusions of Law*, p. 27)

While the original oral agreement between United and Central provided for the payment by Central for the materials which Central installed, the agreement was later modified to provide that such materials were to be paid for directly by United. (R. 1239-1240)

For the first time in this case United, at page 21 of its petition, complains that Central's cross-petition failed to allege performance by Central of its obligations under its contract with United. Apart from the impropriety of raising such an issue for the first time on appeal before this Court, the fact of the matter is that Central's cross-petition did allege its performance, to-wit:

> "6) That pursuant to said last arrangement your answering defendant excavated and laid storm and sanitary sewers and performed certain other work in the total amount of $77,883.14 for which amount due demand was made of United Bonding Insurance Co. and which amount United Bonding Insurance Co. refused to pay." (Answer and Cross-Complaint of Pete Salemi d.b.a. Central Excavating Company)

The Trial Court found that there was clear and convincing evidence that Central performed the work and services for Timzan and United at Brentwood in the sum of $78,573.66 and did render statements for its services to United which were received by United with full knowledge of the workmanship, quality and progress of the work. United at no time protested or expressed any dissatisfaction with Central's work.

VI. The Timzan Contracts Were Not 95% Completed at the Time of Its Abandonment by United. United Had No Right to Partial Payment or Subrogation by Reason of Its Wilful and Intentional Breach of Its Contract and the Lack of Any Benefit Conferred Upon Ashwood by United's Alleged Performance.

United alleges at page 22 of its brief that the owner of Central Excavating Company, Pete Salemi, testified that when he stopped work the contract was 95% complete. That statement is utterly false.

The testimony of Pete Salemi to which United refers is as follows:

> Q. At the time you ceased to do any work, what is your best estimate of the percentage of completion that you had attained with respect to the installation of the storm and sanitary sewer?
>
> * * * * *
>
> A. Very close to 95%.
> Q. Did you put in any water lines?
> A. No.
>
> * * * * *
>
> Q. Did you do any paving?
> A. No." (R. 1198)

The various obligations of Timzan under its contracts with Ashwood are set forth in the contracts themselves. Those obligations included earthmoving, finished grading, slab preparation and clearing, construction and installation of all storm and sanitary sewers, water mains, sidewalks, roads and curbs. It is apparent that "very close to 95%" completion of installation of the storm and sanitary sewers is not the equivalent of 95% completion of all of the contracts. Further, the original estimated cost of the Timzan contracts was $311,000.00. (R. 1662-66) A registered

architectural structural and civil engineer and surveyor testified that the cost of completion of the improvements in Brentwood Subdivision at the time all work thereon had come to a halt was $146,047.00. (R. 2108-09 and 2112-13) Clearly, the contracts in question were not 95% complete.

Moreover, the work that was completed did not confer any benefit upon Ashwood.

Had United completed the Timzan contracts, in accordance with its obligation under the Take Over agreement of April 1, 1965, Ashwood would have been required to pay United the total estimated cost of the Timzan contracts, namely the sum of $311,000.00. (R. 1662-66)

Excluding all amounts awarded Ashwood against United by the District Court, the $311,000.00 which Ashwood would have been required to pay United upon completion of the Timzan contracts is dwarfed by the following expenses and damages incurred by Ashwood as the result of United's breach: $154,150.89 expended by Ashwood, itself, for installation of improvements which were the obligation of Timzan (Ashwood Exhibits OOO-OOOO, QQQQ-BBBBBB) (R. 1877-1912 and 1946-59); $146-047.00, which was the remaining cost of completion of the improvements to have been installed by Timzan in Brentwood Subdivision (R. 2100-14) (Ashwood Exhibit KKKKKK); $61,864.55 incurred by Ashwood for the salaries and expenses of Dover executive employees required to secure new contractors, financing, title work, indemnity bonds, and coordinate completion of the work to have been performed by Timzan and United (R. 1912-34, 1978-83 and 1997-99) (Ashwood Exhibits CCCCCC-EEEEEE); $188,600.00 in lost profits on the 82 homes contracted for in Brentwood Subdivision (Ashwood Exhibits KKK1-82) (R. 1839-49); and $395,600.00 in lost profits on the remaining 172 sublots in Brentwood Sub-

division on which homes would have been constructed and sold. (R. 1528)

In view of all of the amounts expended and all of the damages incurred by Ashwood by reason of United's flagrant breach of its contractual duties to Ashwood, United's assertion of any benefit, let alone a substantial benefit, conferred upon Ashwood is utterly incomprehensible.

Moreover, it is well settled that partial payment is not available to one who voluntarily, wilfully and unjustifiably breaches a contractual duty.

> "Where the undertaking is to do work and furnish materials under the terms of a special contract, and the work is abandoned after part performance, and left unfinished by the fault of the workman, in the absence of all evidence showing the assent of the employer, or his acceptance of the work part finished, there can be no recovery, pro tanto upon any established principle known to the law. The most familiar principles of the law inculcate the observance of good faith in the fulfillment of contracts; and it is the duty of courts to enforce the performance of contracts instead of encouraging their violation." *Allen v. Curles*, 6 Ohio St. 505, 509 (1856). (To the same effect see *Witherow v. Witherow*, 16 Ohio 238 (1847); *Larkin v. Buck*, 11 Ohio St. 562 (1860); and *Mehrin v. Stone*, 37 Ohio St. 49 (1881).)

It is equally settled that subrogation is not available to one who has breached a material contractual duty or is guilty of bad faith or inequitable conduct.

In *National Surety Corp. v. Allen-Codell Co.*, 70 F. Supp. 189 (E.D. Ky. 1947), the Court, holding that a surety was not entitled to subrogation where it was guilty of an inexcusable neglect in fulfilling its duties, held that:

"Subrogation is not an absolute right but, being purely a creature of equity is necessarily governed by the rules of equity. As in other cases in which equitable relief is sought, the court will weigh and balance the equities of the parties in the light of the facts and circumstances of the particular case and grant or withhold relief accordingly. Equitable relief may properly be withheld from one who is himself guilty of inexcusable neglect amounting to wrongful or inequitable conduct respecting the matter in litigation. One who through subrogation seeks relief against a third party must show a superior equity in himself. 'His equity must be strong and his case clear.'"

"It is a fundamental principle of Equity Jurisprudence that a court of equity will not lend its aid to enable one to take advantage of his own wrong. When a party seeking to set judicial machinery in motion in his own behalf, is shown to have breached a material contractual duty or to have been guilty of bad faith or inequitable conduct in the transaction in question, then the doors of the courts will be shut against them; the court will refuse to interfere on his behalf or award him any remedy."

The evidence in this case clearly established that in December, 1964, United wrote three surety bonds to guarantee the performance of Timzan under its contracts with Ashwood. Timzan defaulted, and on April 1, 1965, United agreed to take over and perform the obligations of Timzan. In furtherance of its agreement, it hired sub-contractors and materialmen and agreed to pay them for their labor and materials. On May 7, 1965, it abruptly abandoned its obligations, refused to pay the sub-contractors and materialmen which it had hired, and then advised many of the sub-contractors and materialmen to file mechanic's liens against Brentwood Subdivision,

thereby bringing the development to a grinding halt, and leaving it in a hopeless condition.

The District Court was fully justified in finding that United "wilfully and intentionally breached its obligations" under its bonds and the Takeover Agreement of April 1, 1965, and in refusing United partial payment and subrogation. (Order and Judgment of the District Court entered January 10, 1968; Petition for Writ of Certiorari, *Conclusions of Law*, pp. 47-50)

CONCLUSION.

While United would prefer it to be otherwise, the questions which it presents for consideration by this Court are solely questions of fact which have been heretofore decided and affirmed.

The trial of the within case covered a period of seven weeks. It was tried without a jury to the Honorable Gerard E. Kalbfleisch, Chief Judge of the United States District Court for the Northern District of Ohio. The testimony consumes 2216 pages contained in five volumes and is accompanied by several hundred exhibits, all of which were carefully considered by the District Court, as evidenced by the extensive Findings of Fact set forth in the Appendix hereto and in the Conclusions of Law set forth in the Appendix to United's Petition for Writ of Certiorari.

All of the matters presented were carefully reviewed by the United States Court of Appeals for the Sixth Circuit, which found that the Findings of Fact were supported by substantial evidence and that the Conclusions of Law were correct.

From the foregoing, it is apparent that United has failed to present any appropriate ground or reason for the

granting of its Petition for a Writ of Certiorari. These respondents urge that the Petition be denied.

Respectfully submitted,

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APPENDIX.

FINDINGS OF FACT OF TRIAL COURT.

(Filed December 20, 1967.)

KALBFLEISCH, *Ch. J.*

This cause came on for trial and the Court, having heard the evidence and considered the stipulations of the parties, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT.

1. The Court has jurisdiction of the parties and of the subject matter herein by virtue of Section 1332 and Section 2201 of Title 28, United States Code. There is complete diversity among the parties.

2. The plaintiff, United Bonding Insurance Company, hereinafter called United, is a corporation organized under the laws of the State of Indiana, and is authorized to do business in the State of Ohio as a surety.

3. The defendant Dover Construction Company, hereinafter called Dover, is an Ohio corporation, which through approximately thirteen subsidiary corporations is engaged in the development of real estate and the construction thereon of single-family residences.

4. The defendant Ashwood Construction Company, hereinafter called Ashwood, is an Ohio corporation and a wholly-owned subsidiary of Dover.

5. In the fall of 1963 Ashwood acquired title to certain land situated in Olmsted Township, Ohio, hereinafter called Brentwood, such land being the subject premises of the instant suit.

6. The land in question, Brentwood, was purchased by Ashwood from Bolingbrook Construction Company,

also a wholly owned subsidiary of Dover, the transfer of ownership being accomplished by the assumption of Ashwood of a $125,000.00 mortgage running from Bolingbrook to the National City Bank of Cleveland, Ohio.

7. On October 15, 1964 Ashwood procured a commitment from Prudential Insurance Company, hereinafter called Prudential, for a loan to finance the construction and installation of a sewage treatment plant, water lines, storm and sanitary sewers, sidewalks, asphaltic streets and curbs in Brentwood, which loan was to be secured by a first mortgage upon Brentwood.

8. Said loan commitment from Prudential provided in part for the disbursement to Ashwood of the sum of $500,000.00 on or before October 12, 1965, conditioned upon the completion of the construction and installation at Brentwood of (a) a sewage treatment plant to service a total of 254 sublots in Brentwood, and (b) water lines, storm and sanitary sewers, sidewalks, asphaltic streets, and curbs for 91 of the 254 sublots in Brentwood, said sublots to be developed first.

9. The loan commitment from Prudential provided that in the event disbursement was not made of the sum of $500,000.00 on or before October 12, 1965, the loan commitment would expire and Ashwood would be required to pay Prudential service fees in the sum of $19,312.50.

10. On November 2, 1964, Ashwood entered into an agreement with Commercial Discount Corporation wherein Ashwood assigned to Commercial Discount all purchase money notes and second mortgages acquired by Ashwood in the course of its business from purchasers of land and buildings owned by Ashwood.

11. On May 25, 1965 Commercial Discount notified Prudential of such assignment by Ashwood to Commercial Discount. Prudential did not consider such assignment to destroy or have any effect on the loan commitment from Prudential to Ashwood.

12. Ashwood erected three model homes at Brentwood for prospective purchasers to inspect.

13. On November 12, 1964 Ashwood entered into an agreement with R. A. Klingler, Inc., for the construction and installation of a sewage treatment plant to service the 254 sublots at Brentwood.

14. On December 11, 1964 Ashwood entered into three written agreements with Timzan, Inc., hereinafter called Timzan, for the construction and installation of water lines, sanitary and storm sewers, sidewalks, roads and curbs at Brentwood.

15. Contract one (Ashwood's Ex. II) related to all "earthwork, clearing, finish grading and driveways cut" to be done at Brentwood by Timzan. The base bid price of the contract was $41,146.00.

16. Contract two (Ashwood's Ex. JJ) related to the installation of sewer mains, water mains and storm sewers at Brentwood by Timzan. The base bid price of the contract was $483,985.34.

17. Contract three (Ashwood's Ex. KK) related to all road and curb construction to be done at Brentwood by Timzan. The base bid price of the contract was $184,667.00.

18. The three contracts referred to above contained the express provision that the "Contractor will supply performance bond in the amount of 100% of contract."

19. The three contracts (Ashwood's Ex. II, JJ, and

KK) were to be performed in accord with work order releases, the first of which had to do with the improvement of 91 sublots. (See addenda No. 2 of Ashwood's Ex. II or Ashwood's Ex. O.) The first work order released under contract one (Ashwood's Ex. II), hereinafter referred to as stage one of contract one, was for the sum of $14,000.00; the first work order released under contract two (Ashwood's Ex. JJ), hereinafter referred to as stage one of contract two, was for the sum of $161,000.00; the first work order released under contract three (Ashwood's Ex. KK), hereinafter referred to as stage one of contract three, was for the sum of $76,000.00. Ashwood agreed to accept bond coverage only to the extent of each work order released. (See Ashwood's letter of December 11, 1964 attached to Ashwood's Ex. KK.)

20. Payment by Ashwood on the three contracts was not to be made until all of the work in the work order was completed by Timzan.

21. These three contracts between Ashwood and Timzan were unit price contracts, by the terms of which Timzan was to be paid an amount equal to the total number of units of labor and materials furnished by Timzan, measured at the conclusion of the contract, times the price per unit relating to such labor and materials as set forth in the contracts.

22. In accordance with the contract requirement that Timzan supply a performance bond, three bonds relating to the first work order releases of the contracts were purchased by Timzan from United. These bonds were: United Bond No. CG-1099 in the penal sum of $14,000.00 covering stage one of contract one; United Bond No. CG-1097 in the penal sum of $161,000.00 covering stage one of contract two; and United Bond No. CG-1098 in the

penal sum of $76,000.00 covering stage one of contract three.

23. United Bonds Nos. CG-1097, CG-1098, and CG-1099 contain, inter alia, the following language:

> "* * * the condition of this obligation is such that, if the Principal [Timzan] shall faithfully perform the contract on his part, and shall fully indemnify and save harmless the Obligee [Ashwood] from all cost and damage which the Obligee may suffer by reason of failure so to do and shall fully reimburse and repay the Obligee all outlay and expense which the Obligee may incur in making good any such default, and shall pay all persons who have contracts directly with the Principal for labor or materials, then this obligation shall be null and void, otherwise it shall remain in full force and effect." (See Joint Defendants' Ex. 2.)

24. Ashwood, upon receipt of Bond No. CG-1097, advised Timzan that Timzan's cost estimate covering stage one of contract two was inaccurate; whereupon it was agreed by and between Ashwood and Timzan that the estimated product of the total units of labor and materials to be furnished by Timzan in completing stage one of contract two, times the price designated in the contract for such units would be $221,000.00.

25. In late December of 1964 United was informed of the revised estimate of $221,000.00 agreed to between Timzan and Ashwood for the completion of stage one of contract two relating to the installation of water lines, storm and sanitary sewers on the 91 sublots.

26. United agreed to furnish a rider to its Bond No. CG-1097 in order to increase the coverage thereof from $161,000.00 to $221,000.00. In accordance therewith, on or about March 18, 1965, United, through its duly author-

ized representative, Mr. Edward Donaldson, delivered to Ashwood, with the intention of being bound thereon, a certified copy of a rider to the bond, signed and sealed by Donaldson, to increase the penal sum of Bond No. CG-1097 by the amount of $60,000.00. (Joint Defts.' Ex. 7A and 7B.)

27. Timzan began work on stage one of the three contracts entered into with Ashwood and, pursuant thereto, Timzan contracted for the services of several subcontractors to perform certain work at Brentwood. Among others, such subcontractors included defendant Central Excavating Company, hereinafter called Central; defendant Arrow Builders Supply Company, hereinafter called Arrow; defendant Air Compressor Rental Company, dba A.C.R. Equipment Company, hereinafter called Air Compressor; defendant J. J. Turner, Inc., hereinafter called Turner; defendant Price Bros. Company, hereinafter called Price Bros.; defendant Arturo Construction Company, hereinafter called Arturo; and defendant Empire Excavating Company, hereinafter called Empire.

28. Upon the urging of United who promised to "make good" all rental charges due from Timzan if the same were not paid by Timzan, Central placed two units of heavy excavating equipment together with operating personnel therefor at the Brentwood job site from February 5, 1965 through February 26, 1965, for which Timzan was billed by Central in the amount of $10,918.33.

29. In December of 1964 an agreement was reached between Timzan and Arrow wherein Arrow agreed to supply vitrified sewer pipe and other necessary materials to the Brentwood job site for completion of stage one of the contracts between Ashwood and Timzan. Arrow and Timzan agreed to a definite price and to the specific quan-

tities of pipe and other materials needed, and further agreed that the materials would be delivered as ordered by Timzan. When they accepted the order from Timzan, both Arrow and Central were informed of and relied upon United's performance bond.

30. From February 2, 1965 to March 23, 1965, Arrow sold and delivered materials to the Brentwood job site and Timzan was invoiced at the agreed prices. Timzan's account balance as of March 23, 1965, as related to the Brentwood project was $14,474.76. This amount represented the reasonable value of the materials sold and delivered to Brentwood by Arrow.

31. On January 26, 1965, Air Compressor entered into an agreement with Timzan relating to a piece of equipment known as a Lorain 50 Backhoe. Said piece of equipment was delivered to Brentwood on January 26, 1965 for use by Timzan, and remained in the possession and control of Timzan for a period of five months from the date of delivery. The reasonable rental for such piece of equipment for this period is $6,000.00.

32. On March 2, 1965, Air Compressor entered into a second contract with Timzan relating to a piece of equipment know nas a D-8 Caterpillar Bulldozer. Said bulldozer was delivered to Brentwood in March of 1965 for use by Timzan and remained in the possession and control of Timzan for a period of four months from the date of delivery. The reasonable rental for such piece of equipment for this period is $6,000.00.

33. Air Compressor was informed of and relied upon United's performance bond in accepting the order from Timzan.

34. Central, Arrow and Air Compressor have not received payment from any party for the sums due and

owing to them arising out of their respective contracts with Timzan.

35. In March of 1965 an agreement was reached between Timzan and Turner wherein Turner agreed to supply trenchers and a pump assembly to the Brentwood job site for the completion of stage one of the contract between Timzan and Ashwood. This equipment was used by Timzan at Brentwood from March 17, 1965 until April 17, 1965, the reasonable rental value of the equipment for such period being $935.63. Turner has not received payment from any party covering the stated rental fee.

36. Arturo provided construction equipment and performed work at Brentwood pursuant to a contract with Timzan, the reasonable value of such services being $15,577.20. In April of 1965 Arturo received partial payment in the amount of $10,000.00 from United, but the balance of $5,577.20 has never been paid to Arturo by any party.

37. From February through April of 1965, Price Bros., pursuant to contracts with Timzan and United, furnished concrete pipe for the Brentwood project, the reasonable value of which was $56,190.40. On July 9, 1965, Price Bros., caused a mechanic's lien for such amount to be prepared, filed and recorded. In September of 1965, Ashwood paid Price Bros. the sum of $47,761.92 in full settlement of Price Bros.' claim and release of lien. No payment was ever received by Price Bros. from Timzan or United.

38. Empire, who has failed to make an appearance in this suit, did perform work at Brentwood for which it was not paid, and on April 17, 1965, filed a mechanic's lien against Brentwood for the sum of $7,598.00.

39. As Timzan, pursuant to its contracts with Ashwood, proceeded with work on the Brentwood project it

became apparent to all parties involved that Timzan was having difficulty in completing such contracts, work progress by Timzan fell behind schedule and during the early months of 1965 several of Timzan's subcontractors threatened to stop work at Brentwood due to non-payment by Timzan.

40. Representatives of United became aware of the difficulties Timzan was encountering at Brentwood. They also became acutely aware of the fact that the stage one contracts between Ashwood and Timzan contained a liquidated damage clause by the terms of which Timzan was to pay Ashwood the sum of $300.00 for each day completion of the stage one contracts was delayed beyond April 16, 1965.

41. Recognizing its obligation under its bonds, United persuaded the various subcontractors to return to work at Brentwood and agreed that United would pay all charges of the subcontractors if Timzan failed to do so.

42. In March of 1965 Timzan's problems increased at the Brentwood project and it became apparent to all parties concerned that Timzan was unable to fulfill the commitments on its contracts with Ashwood.

43. The representatives of the various parties involved in the Brentwood project had many meetings in February and March of 1965 in an attempt to resolve the difficulties caused by Timzan's failure.

44. On April 1, 1965 these meetings culminated in a written agreement, signed by the authorized representatives of both Ashwood and United, in which United agreed to assume all of the obligations of Timzan under the latter's contract with Ashwood, and Ashwood agreed that the date for completion of stage one of contract two (Ashwood's Ex. JJ) for installation of water lines and sanitary

and storm sewers would be extended from April 16, 1965 to May 1, 1965.

45. Pursuant to the agreement of April 1, 1965, hereinafter called the takeover agreement by and between Ashwood, Timzan, and United, United hired Central to replace Timzan as main contractor and Central continued work on the Brentwood job site as a direct subcontractor for United. United also agreed to pay Central in accord with invoices furnished covering work performed prior to the takeover agreement of April 1, 1965 (Central's Ex. D).

46. In reliance on United's promise and the formal takeover agreement, Central resumed work at Brentwood on April 8, 1965.

47. On April 8, 1965 Central received a $15,000.00 payment from United. On April 23, 1965 Central received a $12,000.00 payment from United. Transmittal letters accompanying both payments indicated that they were for "Work done for Timzan, Inc."

48. Central continued work at Brentwood until May 27, 1965, sending invoices for all work performed from February 5, 1965 until May 27, 1965, to United. On May 27, 1965 Central terminated its work at Brentwood due to nonpayment of its invoices by United.

49. United not only knew such work was being done but agreed to pay Central for all work done at Brentwood.

50. From February 25, 1965 to June 3, 1965, Central rendered statements for its services to United in the total amount of $105,573.66. United paid Central the sum of $27,000.00 on account, as stated hereinbefore in paragraph 47. United received all of Central's statements with full knowledge of the workmanship, quality of the work, and progress of the work, and made no protest and expressed no dissatisfaction with any of Central's work at any time.

51. The balance due on account for services performed and work done by Central at Brentwood for Timzan and United is $78,573.66.

52. On March 23, 1965 Arrow was instructed by United that, due to the default of Timzan, Arrow should invoice and would be paid by United for all future materials delivered by Arrow to Brentwood. Arrow had not been paid for materials delivered to Timzan at Brentwood and had discontinued sale and shipment of additional orders. But upon United's assurance that it would guarantee payment of Arrow's account with Timzan, under its Bond No. CG-1097, Arrow continued to sell and deliver materials to Brentwood through May of 1965 and, as instructed by United, invoiced United for the sum of $23,077.79 for such materials. Arrow was aware of and relied on the April 1, 1965 takeover agreement between Ashwood and Timzan and United.

53. There remains due and unpaid to Arrow the total sum of $37,552.55 (see findings Nos. 30 and 52) for materials sold to United and Timzan for the Brentwood project.

54. On May 7, 1965 United advised Ashwood by telegram (Joint Dfts.' Ex. 8) that United's Bonds Nos. CG-1097, CG-1098 and CG-1099 were "null and void from their inception," and that Ashwood should be "governed accordingly." United simultaneously informed its authorized representative handling the Brentwood project that "as of this date [May 6, 1965] take no further action of any kind on Timzan matters * * *."

55. United informed Arrow in writing on June 10, 1965, that United was denying any obligation relating to the Brentwood project. Prior thereto both Arrow and Central had stopped work at Brentwood due to nonpayment by United.

56. Upon United's notification that it would not honor its performance bonds and that it would not comply with its agreement to take over the performance of Timzan's obligations on its contracts with Ashwood pursuant to the takeover agreement of April 1, 1965, Ashwood attempted to hire Central to complete the work undertaken by United at Brentwood.

57. Due to the fact that Central had received no payment from Timzan or United for work completed, Central refused to continue work at Brentwood as the direct contractor of Ashwood unless it received periodic progress payments. Such periodic progress payments were not required to be made by Ashwood to Timzan under the contracts between Ashwood and Timzan.

58. Subsequent to United's withdrawal and Central's refusal to continue work at Brentwood, Ashwood made a further search for a general contractor to complete all the work at Brentwood under substantially the same terms as those of the Timzan contracts. No general contractor approached by Ashwood was willing to undertake completion of a job which had been started by another contractor, since problems might arise as to the work previously performed and materials installed, particularly since the original contractor and its suppliers of materials had not been paid for work previously performed and materials furnished. In addition, every general contractor Ashwood sought to obtain demanded periodic progress payments.

59. In an attempt to obtain new financing for the improvement of Brentwood which would include periodic disbursement of funds as the work progressed, Ashwood, in June of 1965, entered into negotiations for a loan with Women's Federal Savings & Loan of Cleveland, Ohio, hereinafter called Women's Federal. In order to obtain a

loan from Women's Federal, Ashwood was forced to pay Women's Federal the amount of $15,750.00 in loan and appraisal fees, and Lawyers Title Insurance Corp. the amount of $2,400.00 in title and escrow fees.

60. Ashwood was successful in its negotiations with Women's Federal for a loan in the sum of $515,000.00, which provided for periodic payments to be made as the work progressed at Brentwood. Ashwood then contracted with B. & L. Excavating, Inc. on June 29, 1965 (Ashwood's Exs. DD and EE) for the completion of installation of water lines, sanitary and storm sewers at Brentwood, and with Griffith Blacktop, Inc. on June 29, 1965 (Ashwood's Ex. FF) for all road and curb construction at Brentwood. These three contracts related to performance of work originally undertaken by Timzan and United.

61. Several of the subcontractors of Timzan and United filed mechanic's liens against the Brentwood premises. The subcontractors who filed and the respective dates of the liens were:

Empire Excav.	—lien filed April 17, 1965
J. J. Turner	—lien filed July 2, 1965
Price Bros.	—lien filed July 9, 1965
Central	—lien filed July 16, 1965
Arrow	—lien filed July 19, 1965
Arturo	—lien filed July 22, 1965
Air Compr.	—lien filed Aug. 11, 1965.

The total of all these liens was the sum of $190,358.93.

62. Several of the subcontractors had been advised by United to file such liens against Brentwood.

63. As a result of the filing of the mechanic's liens, Ashwood was required to obtain a bond from Progressive Mutual Insurance Company to indemnify Women's Federal and also Lawyers Title for any loss by reason of such mechanic's liens. The premium for this bond was $7,200.00.

64. The completion of the Brentwood improvements was delayed beyond October 12, 1965 due to the numerous delays occasioned by the default in performance by United and Timzan. As a result, the loan commitment Ashwood had from Prudential expired. On October 12, 1965, Ashwood requested that Prudential extend the loan commitment relating to Brentwood for ninety days; however, Prudential refused to extend the loan commitment date and Ashwood became obligated to pay Prudential a fee of $19,312.50 by reason of its failure to take such loan.

65. Ashwood entered into purchase order agreements with 82 prospective home owners for homes constructed at Brentwood by Ashwood. All of the prospective purchasers paid sizable downpayments for such homes, ranging from $1,900.00 to $15,000.00.

66. By reason of the delay in the completion of improvements at Brentwood, it became impossible for Ashwood to construct and deliver the homes to the purchasers on the delivery dates promised and this resulted in many of the purchasers canceling their purchase order agreements with Ashwood. By January of 1966 only about 20 of the 82 purchase agreements remained uncanceled.

67. Unfavorable newspaper publicity (Ashwood's Ex. GG) ensued as a result of Ashwood's failure to deliver the homes to the purchasers on the date promised. Ashwood determined that its successful completion of Brentwood was not possible, and concluded that Brentwood should be sold to another builder.

68. Frank W. Kabbes, a registered engineer and surveyor, in May of 1966 estimated the cost of completion at Brentwood of stage one of contracts one, two and three (Ashwood's Exs. II, JJ, and KK) to be $146,047.00.

69. The work Timzan and United performed failed to

meet the specifications in the Timzan contracts, and the expense of correcting the unacceptable work is a very substantial part of the estimated cost by Frank W. Kabbes. (See Finding No. 68.)

70. As of the date fixed for completion of the Timzan contracts, that is, on or about May 15, 1965, Ashwood was solvent. Ashwood was not insolvent at any time relevant to the issues of the instant case.

71. A certified financial statement of Dover and its subsidiaries (Ashwood's Ex. JJJ) shows their combined net worth as of January 31, 1965 to be $3,173,400.00.

72. On or about August 17, 1966, Dover along with all its subsidiaries, including Ashwood, was precipitated into bankruptcy in the District Court for the Northern District of Illinois, Chicago, Illinois. Currently, Dover Construction Company and its subsidiaries are being reorganized, with the debtor remaining in possession, under Chapter XI of the Bankruptcy Act.

73. At the time United repudiated its takeover agreement and bonds in May of 1965, the Prudential loan commitment was more than adequate to meet Ashwood's obligations to Timzan or United pursuant to their contracts with Ashwood. United did not raise the issue of Ashwood's alleged insolvency until subsequent to the filing by Dover, in August of 1966, of its petition for reorganization under Chapter XI of the Bankruptcy Act. (See Finding No. 72.)

74. United failed to prove that anticipated insolvency of Ashwood was the reason for United's breach of its obligations under its bonds and takeover agreement.